VIII. PERJURY AND OBSTRUCTION OF JUSTICE

A. Perjury

This section describes the two principal perjury statutes, 18 U.S.C. §§ 1621 and 1623.1/ Although Title 18 of the United States Code contains over 150 statutes that proscribe perjury,2/ virtually all perjuries occurring in the course of Governmental inquiries, proceedings, and the Federal judicial process are prosecuted under §§ 1621 or 1623.3/ A third statute, 18 U.S.C. § 1622, subornation of perjury, is dealt with in passing.

1. Text of perjury statutes

a. 18 U.S.C. § 1621 - perjury generally

Whoever--

(1) having taken an oath before a competent tribunal, officer or person, in any case in which a law of the

United States authorizes an

1/ Sample indictments are contained in Appendices VII-4 and VII-5.

2/ For a complete list of these statutes, see "Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. I" (cited hereafter as "Working Papers") p. 675, et seq.

3/ In the past, several important political figures have been charged with violating 18 U.S.C. § 1001. This statute is discussed in § C., infra.

oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is

made within or without the United States.

b. 18 U.S.C. § 1623 - false declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under § 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more

declarations which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established

sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that

such proof be made by any particular number of witnesses or by documentary or other type of evidence.

2. Elements of perjury

There are four essential elements of perjury that are substantially the same under § 1623 as under § 1621.

a. The actor must be under oath

First, the actor must be under oath during his testimony, declaration, or certification (except in the case of unsworn declarations under penalty of perjury as permitted by 28 U.S.C. § 1746). So long as the oath is of sufficient clarity that the actor is aware that he is under oath and that he is required to speak the truth, no particular form of oath is required.4/ However, some courts have held that prosecutions under § 1621 require proof of who administered the oath and the competency and authorization of the oath giver.5/ On the other hand, the identity of the person administering the oath is not an essential element under § 1623, nor is proof that such person was competent or authorized to administer the oath. Section 1623 only requires that the Government prove that the maker of a knowingly false declaration be under oath at the time the statement is made.6/ Under § 1623, the testimony of the foreperson of the grand jury before which the defendant

appeared is sufficient to establish that the requisite oath was taken.7/ Although it would be better practice to have the person who administered the oath to the defendant, or at least another grand juror, testify that the oath was given, the transcript of the defendant's grand jury testimony should be sufficient to prove that he testified under oath.8/ Further, although § 1623 does not specify, as does § 1621, that the oath must be taken "before a competent tribunal," false

---

4/ Holy v. United States, 278 F. 521 (7th Cir. 1921).

5/ United States v. Molinares, 700 F.2d 647, 651 (11th Cir. 1983).

6/ Id. at 651-52.

7/ United States v. Prior, 546 F.2d 1254, 1257-58 (5th Cir. 1977).

8/ United States v. Picketts, 655 F.2d 837, 840 (7th Cir.), cert. denied, 454 U.S. 1056 (1981); United States v. Arias, 575 F.2d 253, 254-55 (9th Cir.), cert. denied, 439 U.S. 868 (1978).

swearing before a court having no jurisdiction would undoubtedly not be prosecutable under § 1623.9/

b. The actor must make a false statement

The second necessary element of perjury is that the actor make a false statement. This element is subject, under § 1621, to the "two-witness rule".10/ Falsity is a question of fact for the jury to decide.11/ In determining the falsity of the

defendant's answer, neither the court nor jury must accept the defendant's interpretation of a question or answer.12/ Words clear on their face are to be understood in their common sense and usage unless it is clear in the context in which they are used that a different sense or usage was intended.13/

9/ United States v. Young, 113 F. Supp. 20 (D.D.C. 1953), aff'd, 212 F.2d 236 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954); United States v. Cuddy, 39 F. 696 (S.D. Cal. 1889); see "Working Papers" at 664.

10/ See § A.7.e., infra.

11/ United States v. Sampol, 636 F.2d 621, 655 (D.C. Cir. 1980); United States v. Lighte, 782 F.2d 367, 372 (2d Cir. 1986).

12/ United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); Bednar v. United States, 651 F. Supp. 672, 674 (E.D. Mo. 1986), aff'd, 855 F.2d 859 (8th Cir. 1988).

13/ United States v. Nixon, 816 F.2d 1022, 1030 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

c. False statement must be material

The third necessary element is that the false statement must be material to the proceedings. Materiality has been broadly defined to include anything "capable of influencing the tribunal on the issue before it,"14/ or which "has a natural

tendency to influence, impede or dissuade a grand jury from pursuing its investigations."15/ Thus, the testimony need not actually have influenced, misled, or impeded the proceeding.16/ A potential interference with the grand jury's line of inquiry is sufficient to establish materiality.17/ The statement need not be material to any particular issue, but may be material to the subject of the inquiry in general.18/ The statement may be material to collateral matters that might

---

14/ United States v. Moreno Morales, 815 F.2d 725, 747 (1st Cir.), cert. denied, 484 U.S. 966 (1987); United States v. Friedhaber, 826 F.2d 284, 286 (4th Cir. 1987); United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980); United States v. Swift, 809 F.2d 320, 324 (6th Cir. 1987); United States v. Anderson, 798 F.2d 919, 929 (7th Cir. 1986); United States v. Sablosky, 810 F.2d 167, 169 (8th Cir.), cert. denied, 484 U.S. 833 (1987); United States v. Vap, 852 F.2d 1249, 1253 (10th Cir. 1988); United States v. Molinares, 700 F.2d 647, 653 (11th Cir. 1983).

15/ United States v. Friedhaber, 826 F.2d at 286; United States v. Thompson, 637 F.2d 267, 268 (5th Cir. Unit B Jan. 1981); United States v. Drape, 753 F.2d 660, 663 (8th Cir.), cert. denied, 474 U.S. 821 (1985); United States v. Prantil, 764 F.2d 548, 557 (9th Cir. 1985); United States v. Neal, 822 F.2d 1502, 1506 (10th Cir. 1987).

16/ United States v. Whimpy, 531 F.2d 768, 770 (5th Cir. 1976); United States v. Harrison, 671 F.2d 1159, 1162 (8th Cir.), cert. denied, 459 U.S. 847 (1982); United States v. Anfield, 539 F.2d 674, 677-78 (9th Cir. 1976); United States v. Vap, 852 F.2d at 1253.

17/ United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984).

18/ United States v. Ostertag, 671 F.2d 262 (8th Cir. 1982).

influence the outcome of decisions before the grand jury.19/ Thus, a statement is material if it is relevant to a subsidiary issue under consideration,20/ or to an issue of credibility.21/ Furthermore, the statement need not be relevant to an offense that is

ultimately prosecutable by the grand jury so long as it is a proper subject for investigation by the grand jury.22/ Materiality is not negated if the information sought is cumulative or the grand jury does not believe the answer.23/

The issue of materiality is a question of law to be decided by the court.24/ Materiality need only be shown as of the time the false statement

---

19/ United States v. Thompson, 637 F.2d at 268 n.2; United States v. Sablosky, 810 F.2d at 169.

20/ United States v. Sisack, 527 F.2d 917, 920 (9th Cir. 1975).

21/ United States v. Moreno Morales, 815 F.2d at 747; United States v. Anderson, 798 F.2d at 926; United States v. Sablosky, 810 F.2d at 169.

22/ United States v. Paxson, 861 F.2d 730, 734 (D.C. Cir. 1988); United States v. Vap, 852 F.2d at 1253.

23/ United States v. Berardi, 629 F.2d 723 (2d Cir.), cert. denied, 449 U.S. 995 (1980); United States v. Brown, 666 F.2d 1196, 1200 (8th Cir. 1981), cert. denied, 457 U.S. 1108 (1982).

24/ United States v. Paxson, 861 F.2d at 731; United States v. Stackpole, 811 F.2d 689, 695 (1st Cir. 1987); United States v. Weiss, 752 F.2d 777, 786 (2d Cir.), cert. denied, 474 U.S. 944 (1985); United States v. Bailey, 769 F.2d 203 (4th Cir. 1985); United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); United States v. Seltzer, 794 F.2d 1114, 1123 (6th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Raineri, 670 F.2d 702, 718 (7th Cir.), cert. denied, 459 U.S. 1035 (1982); United States v. Ostertag, 671 F.2d 262, 265 (8th Cir. 1982); United States v. Laranaga, 787 F.2d 489, 494 (10th Cir. 1986); United States v. Carter, 721 F.2d 1514, 1535 n.29 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

was made.25/ The Government need not prove materiality beyond a reasonable doubt but must show it by a

preponderance of the evidence.26/ Materiality may be proven in various ways. The Government may introduce a transcript of the grand jury proceedings; produce testimony from the foreperson of the grand jury or another grand juror; produce the testimony of the defendant before the grand jury; produce other indictments returned by the grand jury; or produce the testimony of the prosecutor concerning the scope of the grand jury's investigation, and the relationship to it of the questions that elicited the perjury.27/

d. Statement must be made with knowledge of its falsity

The fourth necessary element is that the actor make the false statement with knowledge of its falsity.28/ Perjury requires a showing of

---

25/ United States v. Gremillion, 464 F.2d 901, 904-05 (5th Cir.), cert. denied, 409 U.S. 1085 (1972).

26/ United States v. Watson, 623 F.2d 1198 (7th Cir. 1980); United States v. Armilio, 705 F.2d 939 (8th Cir.), cert. denied, 464 U.S. 891 (1983).

27/ United States v. Berardi, 629 F.2d at 727; United States v. Farnham, 791 F.2d 331, 333 (4th Cir. 1986); United States v. Thompson, 637 F.2d at 268; United States v. Anderson, 798 F.2d at 926; United States v. Ashby, 748 F.2d

467, 470 (8th Cir. 1984).

28/ Section 1621 punishes one who "willfully . . . states . . . any material matter which he does not believe to be true. . . ." Section 1623 punishes one who "knowingly makes any false material declaration. . . ." There does not appear to be any effective difference between these two definitions of the mens rea of the offense. In its report on the Organized

Footnote Continued specific

intent.29/ It cannot be the result of inadvertence, honest mistake, carelessness, misunderstanding, mistaken conclusions, or unjustified inferences testified to negligently, or even recklessly.30/ Actual knowledge of falsity may be proven from circumstantial evidence.31/ If the defendant believed his statement to be true when he made it, even though it was, in fact, false, an essential element of the crime cannot be proven and a charge of perjury will be defeated.32/

28/ Continued

Crime Control Act of 1969, the Senate Judiciary Committee stated that in § 1623(a), "[l]anguage changes have been made in the provision as introduced to achieve economy of words . . ." (Senate Report No. 91-617, at 149).

29/ United States v. Dudley, 581 F.2d 1193, 1198 (5th Cir. 1978).

30/ Government of the Canal Zone v. Thrush, 616 F.2d 188, 190-91 (5th Cir. 1980); United States v. Martellano, 675 F.2d 940, 942 (7th Cir. 1982); United States v. Joseph, 651 F. Supp. 1346, 1347 (S.D. Fla. 1987); Dale v. Bartels, 552 F. Supp. 1253, 1266 (S.D.N.Y. 1982), modified, 732 F.2d 278 (2d Cir. 1984).

31/ United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); United States v. Kelly, 540 F.2d 990, 994 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); United States v. Watson, 623 F.2d 1198, 1206-07 (7th Cir. 1980).

32/ United States v. Winter, 348 F.2d 204 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

3. Principal differences between

§ 1623 and § 1621

There are four principal differences between § 1623 and § 1621. First, § 1623 applies only to perjury occurring "before or ancillary to any court or grand jury. . . ."33/ The Supreme Court in Dunn v. United States, 442 U.S. 100, 113 (1979), interpreted this language to preclude prosecution under § 1623 for any false statement made in circumstances less formal than a deposition. False statements made in affidavits in anticipation of their being submitted to a court or grand jury cannot be prosecuted under § 1623. Subsection (a) of the statute, however, does provide for prosecution of statements to a grand jury or court made in reliance on documents which the witness knows are false.34/

Second, under § 1623, the Government's evidentiary burden is reduced as subsection (e) does away with the two-witness rule which still hampers prosecutions under § 1621.35/ In addition, § 1623(c) allows a conviction for making two or more statements which are inconsistent to the degree that one of them is necessarily false.36/ The Government does not have to prove

33/ 18 U.S.C. § 1623(a).

34/ See United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974).

35/ See § A.7.e., infra.

36/ United States v. Flowers, 813 F.2d 1320, 1324 (4th Cir. 1987); United States v. Harvey, 657 F. Supp. 111, 113-14 (E.D. Tenn. 1987).

which statement is false, but it is a defense to such a prosecution that, at the time each statement was made, the defendant believed he was speaking the truth.37/

Third, § 1623 is different from § 1621 in that under the former, in certain circumstances, a recantation is a bar to prosecution for perjury.38/

Finally, both § 1621 and § 1623 provide for maximum prison terms of five years, but the maximum fine under § 1621 is $2,000, while under § 1623, it is $10,000.

4. Section 1622 - subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Prosecution for subornation of perjury requires that the perjury sought must actually have been committed.39/ But a conspiracy to suborn

---

37/ United States v. Flowers, 813 F.2d at 1324.

38/ Section 1623(d). See § A.8.d., infra.

39/ United States v. Brumley, 560 F.2d 1268, 1278 n.5 (5th Cir. 1977); United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972); United States v. Silverman, 745 F.2d 1386, 1394 n.7 (11th Cir. 1984).

perjury may be prosecuted whether or not perjury has been committed.40/ Where perjured testimony is solicited, either by an individual or through a conspiracy, an obstruction of justice has occurred whether or not the perjured testimony has taken place.41/ It is quite common to join both obstruction of justice and subornation of perjury counts in a single indictment when they arise from the same transaction.42/ Because the crime of subornation of perjury is distinct from that of perjury, the suborner and perjurer are not accomplices.43/

The gravamen of the offense of subornation is the procuring of perjury with knowledge that the testimony to be given is false, and that the one testifying is aware of the falsity of his statement.44/ To establish a prima facie case for subornation of perjury, a prosecutor must show:

(1) that perjury was committed;

(2) that the defendant procured the perjury corruptly, knowing, believing or having reason to believe it to be false testimony; and,

---

40/ Williamson v. United States, 207 U.S. 425 (1908); Outlaw v. United States, 81 F.2d 805 (5th Cir.), cert. denied, 298 U.S. 665 (1936).

41/ 18 U.S.C. §§ 1503, 1512.

42/ See, e.g., United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966); United States v. Root, 366 F.2d 377 (9th Cir. 1966), cert. denied, 386 U.S. 912 (1967).

43/ Segal v. United States, 246 F.2d 814, 821 (8th Cir.), cert. denied, 355 U.S. 894 (1957).

44/ Boren v. United States, 144 F. 801 (9th Cir. 1906).

(3) that the defendant knew, believed or had reason to believe that the perjurer had knowledge of the falsity of his testimony.

The existence of the perjury must be proved under the same standards as required by the applicable perjury statute. Thus, if § 1621 applies to the underlying perjury, the demands of the two-witness rule must be met.45/ If § 1623 is applicable to the perjury, the two-witness rule does not apply.46/ If the charge consists only of conspiracy to suborn perjury,

compliance with the two-witness rule is not necessary.47/

5. Investigative responsibility

The Federal Bureau of Investigation has primary investigative responsibility for perjury violations in all cases and matters involving departments and agencies of the United States, except those arising out of a substantive matter being investigated by the Secret Service, Internal Revenue Service, Immigration and Naturalization Service, Bureau of Customs, Bureau of Narcotics and Dangerous Drugs, Bureau of Alcohol, Tobacco and Firearms, and the Postal Inspection Service.48/

45/ Hammer v. United States, 271 U.S. 620, 626 (1926).

46/ United States v. Gross, 375 F. Supp. 971, 975 (D.N.J. 1974), aff'd, 511 F.2d 910 (3d Cir.), cert. denied, 423 U.S. 924 (1975).

47/ United States v. Gross, 511 F.2d 910 (3d Cir.), cert. denied, 423 U.S. 924 (1975); Hall v. United States, 78 F.2d 168 (10th Cir. 1935).

48/ See 28 C.F.R. 0.85(a).

6. Supervisory jurisdiction

Generally, perjury is under the supervisory jurisdiction of the Division and Section of the Department having responsibility for the basic subject matter. Where such subject matter responsibility cannot be identified, supervisory responsibility is with the General Litigation and Legal Advice Section of the Criminal Division.

The General Litigation and Legal Advice Section should be notified in any perjury case involving exceptional circumstances, regardless of the subject matter of the underlying offense, particularly when a question of statutory construction is involved.

Because perjury affects the integrity of the judicial fact-finding process, all offenders should be vigorously prosecuted. Cases may be submitted to the grand jury for its consideration or an information may be filed without prior authorization from the Criminal Division, except with regard to Congressional matters.49/

49/ See U.S.A.M. 9-69.230.

7. Special problems

a. Prosecutorial discretion to indict

under 18 U.S.C. § 1621 or § 1623

There is a latent problem in the area of prosecutorial discretion and 18 U.S.C. § 1623, that has surfaced in two decisions by different panels of the Second Circuit and decisions of the Seventh and Ninth Circuits. In United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973), appellant argued that he was denied equal protection of the law by the prosecutor's decision to proceed against him under § 1623 rather than under § 1621 because the evidentiary burden of the prosecution is lesser and the penalty more severe under the former statute. The court, citing Yick Wo v. Hopkins, 118 U.S. 356 (1886), held that "where criminal statutes overlap the government is entitled to choose among them provided it does not discriminate against any class of defendants." The court found no discrimination because Ruggiero had failed to demonstrate membership in a specific class of defendants.

In United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973), however, the specter of such a class was raised in dictum. Kahn was charged under § 1621 and claimed that, had he been charged under § 1623, his subsequent "recantation" would have barred a perjury prosecution. The court failed to confront the issue directly by holding that Kahn's subsequent "recantation" would not have barred prosecution under § 1623 because at the time it was made, it had become manifest that Kahn's original falsity was exposed. However, the court said "we find not a little

disturbing the prospect of the government employing § 1621 whenever a recantation exists, and § 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."50/ Thus, defendants charged under § 1621 whose perjury would not be prosecutable under § 1623 because of a valid "recantation", might constitute a class denied equal protection under Ruggiero.

In addition to Ruggiero's equal protection argument seeking to limit the prosecutor's discretion, attorneys for Kahn advanced the proposition that a statute aimed at specific conduct (i.e., § 1623) must prevail over an otherwise applicable general statute (i.e., § 1621).51/ The Second Circuit did not reach this question in Kahn. However, in dictum in United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975), the Seventh Circuit disagreed with Kahn's proposition. The court, in rejecting the defendant's equal protection argument, also stated: "Defendant cites no case in support of the novel proposition that where conduct is proscribed by two or more separate criminal statutes, the government must elect to prosecute under the statute imposing the greatest burden of proof."52/

50/ 472 F.2d at 283.

51/ See Kepner v. United States, 195 U.S. 100, 125 (1904); Shelton v. United States, 165 F.2d 241, 244 (D.C. Cir. 1947); Wechsler v. United States, 158 F. 579, 581 (2d Cir. 1907).

52/ 499 F.2d at 139.

In United States v. Clizer, 464 F.2d 121, 125 (9th Cir.), cert. denied, 409 U.S. 1086 (1972), a different approach was taken by the Ninth Circuit. Although appellant had been charged with making false statements before a grand jury, the indictment was under § 1621. The court disregarded the statutory reference in the indictment and considered it as an indictment under § 1623: "The government, despite its reference to 18 U.S.C. § 1621, in fact charged Clizer with a violation of 18 U.S.C. § 1623."

While it appears from the case law that it may be advisable to use 18 U.S.C. § 1623 when it applies to a given factual setting, it is clear that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. . . . Whether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecutor's discretion."53/

b. Venue

Venue for perjury actions lies in the district where the false oath was made, or, where the perjury is committed in an ancillary proceeding.54/

53/ United States v. Batchelder, 442 U.S. 114, 123-24 (1979); United States v. Nixon, 418 U.S. 683, 693 (1974); United States v. Swainson, 548 F.2d 657, 665 (6th Cir.), cert. denied, 431 U.S. 937 (1977).

54/ See Dunn v. United States, 442 U.S. 100, 108-10 (1979) (depositions are considered ancillary proceedings); United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982) (same).
in the district in which the parent proceeding is pending.55/

c. Unresponsive answers: the

case against Samuel Bronston

Occasionally, a witness under oath will try to deceive the questioner and mislead the inquiry by giving answers to questions which, although literally true, are evasive or unresponsive. This occurred in Bronston v. United States, 409 U.S. 352 (1973), in which the Supreme Court unanimously held that such conduct does not violate 18 U.S.C. § 1621.56/ The Court rejected the Government's effort to expand the scope of the perjury statute, noting that "if a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."57/ Thus "any special problems arising from the literally true but unresponsive answer are

---

55/ United States v. Reed, 773 F.2d 477, 483 (2d Cir. 1985) (distinguishing and departing from its prior decision in United States ex rel. Starr v. Mulligan, 59 F.2d 200 (2d Cir. 1932)).

56/ The Court's opinion is equally applicable to 18 U.S.C. § 1623, since the elements of the crime of perjury are substantially the same in each statute. See, e.g., United States v. Slawik, 548 F.2d 75, 83 (3d Cir. 1977); United States v. Abrams, 568 F.2d 411, 422 n.54 (5th Cir.), cert. denied, 437 U.S. 903 (1978); United States v. Eddy, 737 F.2d 564, 571 (6th Cir. 1984).

57/ 409 U.S. at 358-59.
to be remedied through the questioner's acuity and not by a federal perjury prosecution."58/

d. The "I don't remember" syndrome

Prosecutors are often faced with witnesses who, rather than deny a fact, claim that they do not remember it. These witnesses may be prosecuted for perjury.59/ To prove that a witness actually remembered something, it is necessary to prove both that the witness at one time knew the fact and that he must have remembered it at the time he testified.

For example, a witness testifies that he does not remember having ever paid money to a police officer. The first element of proof in a perjury prosecution against him would be that he had, in fact, paid money to a police officer. It would then be necessary to prove that he must have remembered that payment when he testified. If the dates of the transaction and testimony are sufficiently close, memory may be inferred. Probative of his memory at the time of his testimony would be evidence that he mentioned such payments either before or after his testimony or that he remembered other events that

occurred at the same time or earlier than the event in question.

58/ Id. at 362; see also United States v. Earp, 812 F.2d 917 (4th Cir. 1987).

59/ United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Swainson, 548 F.2d 657, 662 (6th Cir.), cert. denied, 431 U.S. 937 (1977); United States v. Nicoletti, 310 F.2d 359 (7th Cir. 1962), cert. denied, 372 U.S. 942 (1963); In re Battaglia, 653 F.2d 419, 421 (9th Cir. 1981).

It has been held in perjury prosecutions under § 1621 that proof that a defendant lied when he stated that he could not remember an event need not be by direct evidence or meet the standards of the two-witness rule.60/n These cases reason that since no direct evidence as to what the defendant actually believed is possible, circumstantial evidence is sufficient.

e. "Two-witness rule"

The so-called "two-witness rule" applies only to prosecutions for perjury brought under 18 U.S.C. § 1621.61/ Congress has eliminated the rule for prosecutions under § 1623 and since the rule is not of constitutional dimension, the courts have deferred to legislative judgment.62/ Thus, because § 1623 is the preferred vehicle for prosecutions of perjury occurring before a court or grand jury,63/ the handicap of the two-witness rule is generally avoided.

The two-witness rule is somewhat of a misnomer. It provides that the falsity of a statement alleged to be perjurious must be established either

---

60/ United States v. Chapin, 515 F.2d at 1284; United States v. Swainson, 548 F.2d at 662; United States v. Nicoletti, 310 F.2d at 363.

61/ United States v. Diggs, 560 F.2d 266, 269 (7th Cir.), cert. denied, 434 U.S. 925 (1977).

62/ See Weiler v. United States, 323 U.S. 606 (1945); Hammer v. United States, 271 U.S. 620 (1926); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973); United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979).

63/ See § A.7.a., supra.

by the testimony of two independent witnesses, or by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused.64/ Thus, the rule is satisfied by the testimony of a second witness who has given testimony independent of another which, if believed, would prove that what the accused said under oath was false. In this case, it is immaterial whether such witness corroborates the first witness.65/ Alternatively, the rule is satisfied by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused and of a quality to assure that a guilty verdict is solidly founded.66/

It should be emphasized that the two-witness rule applies only to proof that a given statement was objectively false. Circumstantial evidence may be used to establish that a perjury defendant made the false statement willfully or with

knowledge of its falsity.67/

The two-witness rule does not apply to § 1621 prosecutions where the defendant is prosecuted for falsely testifying that he was unable to remember a certain event.68/ Neither does it apply to prosecutions for

---

64/ United States v. Maultasch, 596 F.2d 19, 25 n.9 (2d Cir. 1979); United States v. Forrest, 639 F.2d 1224, 1226 (5th Cir. Unit B Mar. 1981).

65/ United States v. Maultasch, 596 F.2d at 25.

66/ United States v. Maultasch, 596 F.2d at 25 n.9; United States v. Forrest, 639 F.2d at 1226.

67/ United States v. Hagarty, 388 F.2d 713, 716 n.2 (7th Cir. 1968).

68/ See § A.7.d, supra.

obstruction of justice (18 U.S.C. §§ 1503, 1505), even if the gravamen of the obstruction is that the defendant perjured himself.69/

f. The "use" of material containing false statements

In addition to prohibiting the making of false statements, § 1623 applies to one who:

. . . under oath in any proceeding . . . makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration. . . .

The legislative history of § 1623 is silent as to what type of conduct the "makes or uses" part of the statute is intended to cover. In United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974), the prosecutor subpoenaed defendants and their corporate records. The defendants altered the records, brought them to the grand jury and "relied upon these false documents in answering the United States Attorney's questions. . . ." The appellate court found such conduct to be "use" of the documents before the grand jury.70/ In United States v.

69/ United States v. Alo, 439 F.2d 751 (2d Cir.) (prosecution for obstruction of justice, rather than for perjury, is not an improper evasion of the two-witness rule), cert. denied, 404 U.S. 850 (1971).

70/ See also United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986); United States v. Norton, 755 F.2d 1428 (11th Cir. 1985).
Dudley, 581 F.2d 1193, 1197 (5th Cir. 1978), the court held that physical delivery by the alleged user is not a necessary prerequisite to use under § 1623. It is sufficient that the testimony of the accused tended to give verity to the document.

Other conduct that may constitute perjury is the use of false affidavits submitted in federal court proceedings. In Dunn v. United States, 442 U.S. 100 (1979), the Supreme Court held that a false affidavit submitted to a federal court in

support of a motion to dismiss an indictment could not be prosecuted as perjury under § 1623 since such an affidavit lacked the formality required of court proceedings or depositions and therefore was not given in a "proceeding before or ancillary to any court or grand jury of the United States" as required by § 1623(a). However, prosecutions for false affidavits submitted in federal court proceedings can be prosecuted under § 1621. Venue for such prosecutions is in the district where the affidavit is sworn. Thus, in those cases in which an affidavit filed in United States District Court in one district was sworn in another district, the perjury prosecution under § 1621 must be brought in the latter district.

g. Indictments71/

71/ See Ch. VII § B.8.

Based on current case law, the Government has some discretion as to how to charge separate, but related, false statements. Courts have held that all of the false declarations pertaining to a particular subject matter may be embraced in one count.72/ This includes minor questions which assign falsity to a witness' denial of knowledge about the general line of inquiry.73/ Charging the crime in this manner does not render the indictment infirm for duplicity as only one offense is

contained in the count.74/ In such a situation, proof of the falsity of any one statement charged will sustain the count.75/ On the other hand, false statements made during one grand jury session which are separate and distinct can be charged in multiple counts with separate sentences imposed for a conviction on each count.76/ For instance, in United States v. Scott, 682 F.2d at 698, the court held that separate and distinct false declarations which require different factual proof of falsity may be charged in separate counts even

---

72/ United States v. Edmondson, 410 F.2d 670, 673 n.6 (5th Cir.), cert. denied, 396 U.S. 966 (1969); United States v. Isaacs, 493 F.2d 1124, 1155 (7th Cir.), cert. denied, 417 U.S. 976 (1974); Vitello v. United States, 425 F.2d 416, 418 (9th Cir.), cert. denied, 400 U.S. 822 (1970).

73/ See Arena v. United States, 226 F.2d 227 (9th Cir. 1955), cert. denied, 350 U.S. 954 (1956).

74/ United States v. Ramos, 666 F.2d 469, 473 (11th Cir. 1982); see also United States v. Wood, 780 F.2d 955, 962 (11th Cir.), cert. denied, 476 U.S. 1184 (1986).

75/ United States v. Kehoe, 562 F.2d 65, 69 (1st Cir. 1977); United States v. De La Torre, 634 F.2d 792, 794-95 (5th Cir. Unit A Jan. 1981); United States v. Isaacs, 493 F.2d at 1155; Vitello v. United States, 425 F.2d at 418.

76/ United States v. De La Torre, 634 F.2d at 794-95.

though they are related and arise out of the same transaction.77/ Furthermore, the fact that a single piece of evidence may be used to prove two counts does not make an indictment multiplicitous.78/ Two counts are considered to be separate offenses if the proof of one requires an additional fact that proof of the other does not require.79/

A perjury indictment must set forth the precise falsehoods alleged and the factual basis of their falsity with sufficient clarity to permit a jury to determine their verity and to allow meaningful judicial review of the materiality of those falsehoods.80/ However, the materiality requirement of a perjury indictment may be satisfied by a general statement that the matter was material.81/

There is no requirement that the perjury occur before the grand jury that issues the indictment82/ and it is the preferred Division practice to present a perjury indictment to a grand jury that did not hear the perjured

---

77/ See also United States v. Harrelson, 754 F.2d 1182, 1184 (5th Cir.), cert. denied, 474 U.S. 908 (1985); United States v. Wood, 780 F.2d at 962.

78/ United States v. Stanfa, 685 F.2d 85, 88 (3d Cir. 1982).

79/ Id. at 87; see also Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Doulin, 538 F.2d 466, 471 (2d Cir.), cert. denied, 429 U.S. 895 (1976). Chapter VII § G contains a more detailed discussion of multiplicity.

80/ United States v. Slawik, 548 F.2d 75 (3d Cir. 1977); see also United States v. Ryan, 828 F.2d 1010, 1015 (3d Cir. 1987).

81/ United States v. Ponticelli, 622 F.2d 985, 989 (9th Cir.), cert. denied, 449 U.S. 1016 (1980).

82/ United States v. Sun Myung Moon, 532 F. Supp. 1360, 1371 (S.D.N.Y. 1982).

testimony. Nor is there a requirement that the grand jury must be able to indict for the substantive offense inquired into. A grand jury may ask questions about events outside of the statute of limitations, or about acts that otherwise would not lead to

indictments.83/ However, the courts will strictly scrutinize for fairness any indictment and conviction for perjury before a grand jury that rests upon a defendant's responses to leading questions.84/

8. Defenses and bars to prosecution

a. In general

A primary defense to an indictment for perjury is that the defendant believed his statement to be true at the time he made it. Belief that a declaration was true when made is specifically a defense to prosecution under § 1623(c). The major element the Government must prove under § 1621 and § 1623 is that the defendant made a false statement knowing it to be false. If the Government is unable to prove this element beyond a reasonable doubt, the defendant is entitled to a directed verdict. Proof that a defendant believed a declaration was true defeats a charge of perjury

---

83/ United States v. Picketts, 655 F.2d 837, 841 (7th Cir.), cert. denied, 454 U.S. 1056 (1981); United States v. Reed, 647 F.2d 849, 853 (8th Cir. 1981).

84/ United States v. Vesaas, 586 F.2d 101, 105 (8th Cir. 1978).

even if the statement was, in fact, false.85/ The defense of advice of counsel usually may only be considered by the jury in

determining whether the defendant willfully or knowingly gave false testimony.86/

b. Collateral estoppel

Collateral estoppel87/ "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit."88/ Collateral estoppel has been an established rule of federal law at least since United States v. Oppenheimer, 242 U.S. 85 (1916), and is now viewed as an integral part of the 5th Amendment ban against double jeopardy.89/

A prosecutor encounters no double jeopardy or collateral estoppel problem when prosecuting a convicted defendant for perjury committed during

---

85/ United States v. Winter, 348 F.2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

86/ United States v. Becker, 203 F. Supp. 467 (E.D. Va. 1962).

87/ Res judicata, though sometimes used interchangeably with collateral estoppel, has a distinct meaning and refers to "the preclusion of a claim or cause of activity where that claim has been fully litigated and decided in prior suit." United States v. Drevetzki, 338 F. Supp. 403, 405 (N.D. Ill. 1972).

88/ Ashe v. Swenson, 397 U.S. 436, 443 (1970); see also United States v. Hernandez, 572 F.2d 218, 220 (9th Cir.

1978).

89/ Harris v. Washington, 404 U.S. 55, 56 (1971).

his former trial on a substantive offense.90/ Nor is there any collateral estoppel problem when prosecuting a trial witness for perjury, since a witness is not a party to the suit.

The question of whether collateral estoppel bars prosecution for perjury usually arises where a defendant who has taken the stand and perjured himself has been acquitted of the substantive offense and is charged with perjury for testimony given at his trial. The collateral estoppel claim is that the jury, by acquitting the defendant, adjudicated the truthfulness of his testimony in his favor and that the Government is barred from litigating that issue again.

The problem with such a claim is that since the Government must prove every element of its case beyond a reasonable doubt and since the jury's general verdict does not indicate which elements it found lacking in proof, it is difficult to determine whether the jury's acquittal was based on a finding that the defendant's testimony was credible or whether, even though it disbelieved the defendant, the jury found the Government's case deficient in some other respect.

Clearly, if the defendant's only testimony is a general denial of guilt, an acquittal would be a bar to a perjury prosecution. In most situations, however, an inquiry must be made into what issues the jury's acquittal "necessarily" adjudicated. In Sealfon v. United States, 332 U.S. 575, 579 (1948), the Supreme Court held that the determination "depends upon

90/ United States v. Williams, 341 U.S. 58, 62 (1951); United States v. Nixon, 634 F.2d 306, 309 (5th Cir.), cert. denied, 454 U.S. 828 (1981).

the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."

In confirming this point, the Court in Ashe v. Swenson, 397 U.S. 436, 444 (1970),91/ held:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration.

Thus, the acquittal of a defendant following a trial on criminal charges does not necessarily bar his subsequent prosecution for perjury committed during the course of the trial. It is only when an issue of ultimate fact or an element essential to conviction has once been determined by a final judgment in a criminal case that the same issue cannot be relitigated.92/ In such situations, the collateral estoppel doctrine requires: (1) an identification of the issues in the two actions to determine whether they are sufficiently similar and material; (2) an

91/ See United States v. Williams, 341 U.S. 58 (1951).

92/ United States v. Fayer, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831 (1978); United States v. Giarratano, 622 F.2d 153, 155 (5th Cir. 1980); United States v. Sarno, 596 F.2d 404, 407-08 (9th Cir. 1979).
examination of the record of the prior case to decide whether the issue was litigated in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.93/ Significantly, the burden is on the defendant to establish that the verdict in the prior trial necessarily determined in his favor the issue which he contends should not be considered.94/

The prosecutor must make a thorough analysis of each case to determine if collateral estoppel dictates that an acquittal in a prior trial forecloses a subsequent perjury indictment. Before an indictment of an acquitted defendant for perjury based upon his testimony at trial is sought, the possibility that such a prosecution has been foreclosed should be explored fully so the Government will avoid the appearance of vindictive prosecution or waste of Government resources. In appropriate cases, the Criminal Division may be consulted prior to bringing such prosecutions to avoid development of restrictive precedents.

c. Lack of Miranda warning

Generally, an indictment for perjury before a grand jury will not be dismissed for failure to advise the witness of his

right not to incriminate himself.95/ There is also no duty to warn the witness of the consequences

---

93/ United States v. Sarno, 596 F.2d at 408.

94/ United States v. Fayer, 573 F.2d at 745; United States v. Giarratano, 622 F.2d at 156 n.4.

95/ United States v. Prior, 553 F.2d 381, 383 (5th Cir. 1977).

of committing perjury before the grand jury.96/ However, Department of Justice guidelines require prosecutors to give grand jury witnesses warnings resembling Miranda warnings and to advise putative defendants of their status as such,97/ although failure to do so does not constitute grounds for dismissal of an indictment.98/

d. Recantation

1) In general. 18 U.S.C. § 1623(d) provides that, in certain limited circumstances, a retraction and correction of false testimony by a witness will act as a bar to prosecution for the initial perjury. Before the enactment of § 1623, the federal law, under § 1621, was that the crime of perjury was complete as soon as the false statement was made,99/ and that a subsequent retraction and correction of the testimony did not erase the perjury, but was only relevant as an affirmative defense

96/ United States v. Babb, 807 F.2d 272, 277 (1st Cir. 1986).

97/ See U.S.A.M. 9-11.150; United States v. Jacobs, 547 F.2d 772, 774-75 (2d Cir. 1976) (court may exercise supervisory power to suppress perjured testimony when prosecutor fails to advise grand jury witness of putative defendant status in accordance with practice of United States attorneys in circuit), cert. dismissed per curiam, 436 U.S. 31 (1978).

98/ United States v. Catino, 735 F.2d 718, 725 (2d Cir.), cert. denied, 469 U.S. 855 (1984). For a more complete discussion of the rights of witnesses before the grand jury, see Ch. IV § F.2.

99/ United States v. Norris, 300 U.S. 564, 574 (1937).
in showing the absence of intent to commit perjury.100/ Since recantation is a bar to prosecution under § 1623 rather than an affirmative defense, the issue of recantation is an issue of law to be decided by the court.101/ This defense must be raised before trial under Fed. R. Crim. P. 12(b)(2), as a jurisdictional bar to prosecution.102/

18 U.S.C. § 1623(d), which was adopted in modified form from the New York Penal Code § 210.5,103/ provides:

> Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

It is clear from the above that a witness' admission of the falsity of his declarations does not automatically bar prosecution, but that

---

100/ United States v. Goguen, 723 F.2d 1012, 1020 (1st Cir. 1983); United States v. Kahn, 472 F.2d 272, 284 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

101/ United States v. Goguen, 723 F.2d at 1017; United States v. D'Auria, 672 F.2d 1085, 1091 (2d Cir. 1982); United States v. Denison, 663 F.2d 611, 618 (5th Cir. Unit B Dec. 1981).

102/ United States v. Goguen, 723 F.2d at 1017; United States v. D'Auria, 672 F.2d at 1091; United States v. Denison, 663 F.2d at 618.

103/ See People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580 (1957).

prosecution is barred only if the admission occurs at a time when the false declarations have "not substantially affected the proceeding, and it has not become manifest that such falsity has been or will be exposed."104/ Thus, if either of these conditions has already occurred prior to the time of the witness' reappearance to correct his testimony, the recantation provisions of § 1623(d) are inapplicable and cannot be invoked to bar prosecution.105/ Moreover, the burden is on the defendant to show that he is within the protection of the recantation exemption.106/

In ruling on the timeliness of claimed recantation by a witness, the courts have generally interpreted the "manifest" proviso of § 1623(d) as applying specifically to the witness' knowledge, derived either from independent sources or directly from the Government prosecutor, that the falsity of his prior statements "has been or will be exposed." In the cases where the

witness possesses such knowledge, the courts have consistently held that no effective recantation can thereafter be made.107/

104/ See United States v. Dworkin, 116 F.R.D. 29, 30 n.1 (E.D. Va. 1987).

105/ United States v. Moore, 613 F.2d 1029, 1039-40 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980); United States v. Goguen, 723 F.2d at 1018 n.7; United States v. Denison, 663 F.2d at 615.

106/ United States v. Moore, 613 F.2d at 1044; United States v. Scrimgeour, 636 F.2d at 1024.

107/ United States v. Moore, 613 F.2d at 1039; United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Del Toro, 513 F.2d 656, 666 (2d Cir.), cert. denied, 423 U.S. 826 (1976); United States v. Dennison, 663 F.2d supra.

At least one case, however, suggests, by implication, that "manifest" can also be interpreted to mean that the falsity of the witness' statements has merely become known to the Government or the grand jury, as opposed to the witness. In United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973), the Second Circuit held that a § 1623(d) defense was not available to the defendant since at the time of his alleged recantation, several other witnesses had already testified concerning the bribes, knowledge of which he had falsely denied during his initial grand jury appearance. There is no indication in the opinion of a finding by the court that at the time of the defendant's attempted recantation, he had any knowledge of the contradictory testimony heard by the grand jury.

There is also some question as to the standards to be applied in determining when the false declarations of a witness will be considered as having "substantially affected the proceedings", thereby precluding an effective recantation. Certainly, a timely recantation would be precluded in any case where the grand jury has already acted.108/

Further, in United States v. Crandall, 363 F. Supp. 648 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir.), cert. denied, 419 U.S. 852 (1974), the court found that the defendant's false declarations had substantially affected the proceedings since the grand jury had been deprived initially of relevant testimony as to the guilt of other individuals which resulted in a several month delay in the grand jury's investigation.

108/ See United States v. Baldwin, 506 F. Supp. 300, 301 (M.D. Tenn. 1980); United States v. Krogh, 366 F. Supp. 1255, 1256 (D.D.C. 1973).

While the cases offer some guidance, the determination of whether a given proceeding has been substantially affected by the witness' false declarations can only be made after a consideration of the facts and circumstances of the particular court or grand jury proceeding.

Since the statutory language of § 1623(d) requires both conditions to be satisfied for a valid recantation, reappearance before a grand jury to correct testimony after one of the conditions has occurred does not preclude prosecution for false declarations under § 1623.109/

2) Necessity of advising a witness of recantation provision of § 1623(d). A prosecutor is under no duty to advise a witness of the possibility of recanting under § 1623(d).110/ This is so even if the prosecutor advises the witness of the penalties for perjury.111/ In addition, there is no requirement that the Government reveal to a perjurer that it has evidence of the untruthfulness of his statements, nor must the Government delay revealing incriminating evidence to allow the witness to reflect on his perjury.112/

109/ United States v. Del Toro, 513 F.2d supra; United States v. Mitchell, 397 F. Supp. 166 (D.D.C. 1974), aff'd, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

110/ United States v. D'Auria, 672 F.2d 1085, 1092 (2d Cir. 1982); United States v. Scrimgeour, 636 F.2d 1019, 1026 (5th Cir. Unit B), cert. denied, 454 U.S. 878 (1981); United States v. Anfield, 539 F.2d 674, 679 (9th Cir. 1976).

111/ United States v. Lardieri, 506 F.2d 319, 322 n.2 (3d Cir. 1974).

112/ United States v. D'Auria, 672 F.2d at 1093; United States v. Denison, 663 F.2d 611, 616-17 (5th Cir. Unit B Dec. 1981).

A heretofore unraised problem exists when a prosecutor gives a witness an opportunity to "straighten out" his testimony by recanting at a point in time when a recantation will not be valid. As set forth above, a recantation is effective only if made before it is clear that the perjury will be exposed or before the perjurious statement has misled the proceeding. It would seem that an argument could be made that the Government is estopped from challenging a witness' eligibility to recant

if it solicits the recantation. Therefore, a prosecutor usually should not solicit a recantation unless he is willing to forego a prosecution for perjury and, normally, no perjury prosecution should be undertaken subsequent to a solicited recantation even if the defendant was technically ineligible under § 1623(d).

3) Witness' right to recant. If a witness who has completed his testimony requests that he be allowed to reappear before the grand jury for the purpose of recantation, the prosecutor should grant the request, if timely made, in keeping with the legislative intent of § 1623(d) – promotion of truthful testimony.113/

To recant, the witness must, as a condition precedent to giving truthful testimony, admit that his perjurious testimony was false.114/ An outright retraction and repudiation of the false testimony is essential to a

---

113/ See Congressional Record - Senate, June 9, 1970, S. Rep. No. 8656.

114/ United States v. Vesich, 724 F.2d 451, 460 (5th Cir. 1984).

recantation within the meaning of the statute.115/ Ambiguous statements regarding confusion of the witness or requests to add to and clarify testimony are not sufficient. "Unless he admits that he gave false testimony, there is no occasion for a recantation."116/

It is clear, however, that the reappearance by the witness after it has become "manifest" that the falsity of his

previous testimony "has been or will be exposed" does not preclude the Government from prosecuting the witness for his prior false declarations before the grand jury.117/

e. Immunity

The fact that the defendant testified with immunity before the grand jury or in a trial does not protect him from prosecution for perjured testimony made during the giving of the immunized testimony.118/ Perjury prosecutions based on immunized testimony are permissible and all statements

---

115/ United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. D'Auria, 672 F.2d 1085, 1091-92 (2d Cir. 1982); United States v. Vesich, 724 F.2d at 460.

116/ United States v. D'Auria, 672 F.2d at 1092; accord United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983).

117/ United States v. Del Toro, 513 F.2d 656, 666 (2d Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Mitchell, 397 F. Supp. 166, 177 (D.D.C. 1974), aff'd, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); United States v. Crandall, 363 F. Supp. 648, 655 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir.), cert. denied, 419 U.S. 852 (1974).

118/ See 18 U.S.C. §§ 6002, 6003; United States v. Wong, 431 U.S. 174, 178-79 (1977); United States v. Martinez-Navarro, 604 F.2d 1184, 1187 (9th Cir. 1979), cert. denied, 444 U.S. 1084 (1980).
made during the giving of the immunized testimony, both true and false, may be admitted in the course of a subsequent

perjury action if such use is not otherwise prohibited by the 5th Amendment.119/

B. Obstruction of Justice

Obstruction of justice is covered by a number of overlapping statutes generally found within Chapter 73 of Title 18 of the U.S. Code, "Obstruction of Justice." These statutes are result oriented and most activities that would obstruct or impede the administration of justice can be addressed by one or more of them. Perjury (18 U.S.C. § 1621), false declarations (18 U.S.C. § 1623), and false statements (18 U.S.C. § 1001), which are also methods by which justice can be obstructed, are discussed elsewhere in this chapter. This section will focus primarily on 18 U.S.C. § 1503, and touch only in passing on the narrow statutes.120/

1. Text of 18 U.S.C. § 1503

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or

119/ United States v. Apfelbaum, 445 U.S. 115, 130 (1980); In re Corrugated Container Antitrust Litig., 661 F.2d 1145, 1158 (7th Cir. 1981), aff'd sub nom. Pillsbury v. Conboy, 459 U.S. 248 (1983).

120/ For a more detailed exposition of these statutes, see U.S.A.M. 9-69.100, et seq.

> impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 is one of three broadly drawn statutes prohibiting conduct that would obstruct justice. The other two, 18 U.S.C. § 1512, tampering with a witness, victim, or an informant, and 18 U.S.C. § 1513, retaliating against a witness, victim, or an informant, became effective in October of 1982 as part of the Victim and Witness Protection Act of 1982 (VWPA).121/

121/ Prior to the passage of the VWPA, actions affecting witnesses were also specifically covered by § 1503.

2. The nature of the crime

18 U.S.C. § 1503 is comprised of two parts. The first part generally prohibits endeavors to "corruptly, or by threats or force, influence, intimidate, or impede. . ." any grand or petit juror, or court official. The second part -- the so-called omnibus clause -- punishes anyone, who "corruptly, or by threats or force, influences, obstructs, or impedes, the due administration of justice," or endeavors to do so. The omnibus clause extends to "those means of interference the draftsmen were not prescient enough to enumerate."122/ It is not limited by the concept of ejusdem generis to actions accomplished by means of coercion or intimidation.123/ Nor are actions taken against witnesses outside of its purview.124/

Courts have not been particularly concerned with defining the conduct that constitutes interference with the "due administration of justice." A definition put forth by the Ninth Circuit is "conduct designed to interfere

122/ United States v. Bonanno, 177 F. Supp. 106, 114 (S.D.N.Y. 1959).

123/ United States v. Walasek, 527 F.2d 676 (3d Cir. 1975).

124/ See the legislative history of the VWPA, particularly S. 2420, 97th Cong., 2d Sess., 128 Cong. Rec. S11430 (daily ed. Sept. 14, 1982), S. Rep. No. 532, 97th Cong., 2d Sess. 17-19, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2523-25, and 128 Cong. Rec. S13063 (daily ed. Oct. 1, 1982) (remarks of Senator Heinz). Initially, an omnibus clause such as that in § 1503 was included within § 1512; it was taken out of the bill because it was beyond the scope of the witness protection legislation, and probably duplicative of other obstruction of justice statutes. But see United States v. Hernandez, 730 F.2d 895 (2d Cir. 1984), interpreting 18 U.S.C. §§ 1512 and 1503.
with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court."125/

a. Civil as well as criminal proceedings can be obstructed

The great majority of cases under § 1503 have involved endeavors to obstruct witnesses, jurors or officials in grand jury investigations or criminal trials. But the handful of courts that have addressed the issue directly have held that the statute also covers endeavors to obstruct pending civil proceedings.126/ Furthermore, the United States need not be a party to the case, as the justice being administered is that of the United States.127/

125/ Haili v. United States, 260 F.2d 744, 746 (9th Cir. 1958).

126/ Wilder v. United States, 143 F. 433, 440 (4th Cir. 1906) (construing Rev. Stat. §§ 5399 and 5440, precursors of § 1503), cert. denied, 204 U.S. 674 (1907); Sneed v. United States, 298 F. 911, 912 (5th Cir.) (construing 18 U.S.C. § 241, another precursor of § 1503), cert. denied, 265 U.S. 590 (1924); Roberts v. United States, 239 F.2d 467, 476 (9th Cir. 1956).

127/ Pettibone v. United States, 148 U.S. 197 (1893); Wilder v. United States, 143 F. supra; Sneed v. United States, 298 F. supra.

b. "Endeavors" as well as actual obstructions prohibited

The statute speaks of "endeavors" rather than "attempts" to obstruct. The term "endeavor" has been held to be broader than "attempt." As stated in United States v. Russell, 255 U.S. 138, 143 (1921):

> The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. . . .128/

IndUnited States v. Tedesco, 635 F.2d 902, 907 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981), the court

observed, '"endeavor' connotes a somewhat lower threshold of purposeful activity than 'attempt,'. . .'the fact that the effort to influence was subtle or circuitous' made no difference," (quoting United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975)).

An endeavor "can be committed merely by words"129/ and need not be

---

128/ Accord Osborn v. United States, 385 U.S. 323, 333 (1966).

129/ United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978).

successful to be criminal.130/ Factual impossibility is not a defense.131/

c. Endeavors to influence jurors or officials

The first clause of § 1503 prohibits endeavors to influence, intimidate or impede any grand or petit juror, or officer of any court whether these endeavors are by threat or force or are "corrupt". The term "officer" has been held to include veniremen,132/ federal district judges,133/ and U.S. Attorneys.134/

d. Endeavors to obstruct the

due administration of justice

130/ Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968); Catrino v. United States, 176 F.2d 884, 886 (9th Cir. 1949).

131/ See generally Osborn v. United States, 385 U.S. 323, 332-33 (1966); United States v. Lazzerini, 611 F.2d 940, 941-42 (1st Cir. 1979); United States v. Rosner, 485 F.2d 1213, 1228-29 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); United States v. Roe, 529 F.2d 629, 631-32 (4th Cir. 1975); Knight v. United States, 310 F.2d 305, 307 (5th Cir. 1962) (per curiam).

132/ United States v. Jackson, 607 F.2d 1219, 1222 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

133/ United States v. Margoles, 294 F.2d 371, 373 (7th Cir.), cert. denied, 368 U.S. 930 (1961).

134/ United States v. Polakoff, 112 F.2d 888, 890 (2d Cir.), cert. denied, 311 U.S. 653 (1940).

The omnibus clause of § 1503 has been interpreted very broadly to cover actions that, whether or not taken with respect to jurors, officials, or witnesses, or by means of threats, force or intimidation, tend to impede the due administration of justice. Thus, it covers destruction of documents sought by a federal grand jury,135/ presenting fraudulent documents at a civil attachment proceeding,136/ attempts to sell grand jury transcripts,137/ concealment, destruction or alteration of documents subpoenaed by a federal grand jury,138/ and falsifying a report likely to be submitted to a grand jury.139/

An indictment charging an endeavor to impede the work of a grand jury by destroying, concealing or altering documents must allege that the defendant knew, or had reason to know, that the documents would be called for by the grand jury.140/ The documents, however, need not be subject to a

---

135/ United States v. Walasek, 527 F.2d 676 (3d Cir. 1975); United States v. Siegel, 152 F. Supp. 370 (S.D.N.Y. 1957).

136/ United States v. Coven, 662 F.2d 162, 170 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982).

137/ United States v. Howard, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

138/ United States v. Weiss, 491 F.2d 460 (2d Cir.), cert. denied, 419 U.S. 833 (1974); United States v. Simmons, 591 F.2d 206 (3d Cir. 1979); United States v. Faudman, 640 F.2d 20 (6th Cir. 1981); United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).

139/ United States v. Shoup, 608 F.2d 950 (3d Cir. 1979).

140/ United States v. Faudman, 640 F.2d at 21; United States v. Siegel, 152 F. Supp. at 376; United States v. Fineman, 434 F. Supp. 197, 202 (E.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978).
subpoena.141/ It does not matter whether the administration of justice is actually hindered.142/

The Second Circuit in United States v. Weiss, 491 F.2d at 466, approved the trial court's instruction that a § 1503 conviction "requires proof of more than mere failure to produce. . . documents. . ." and that ". . . some affirmative conduct. . . such as destruction, concealment or removal of the documents" must be shown.

The omnibus clause of § 1503 has also been held to cover endeavors to suborn perjury or influence a witness not to testify,143/ giving false denials of knowledge and memory,144/ giving false and evasive testimony,145/ and endeavoring to influence a judge146/ or a juror through a third party.147/

141/ United States v. Solow, 138 F. Supp. 812, 814 (S.D.N.Y. 1956).

142/ Osborn v. United States, 385 U.S. 323, 333 (1966); United States v. Russell, 255 U.S. 138, 143 (1921); United States v. Nicosia, 638 F.2d 970, 975 (7th Cir. 1980), cert. denied, 452 U.S. 961 (1981).

143/ United States v. Partin, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

144/ United States v. Griffin, 589 F.2d 200 (5th Cir.), cert. denied, 444 U.S. 825 (1979).

145/ United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972).

146/ United States v. Glickman, 604 F.2d 625 (9th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

147/ United States v. Ogle, 613 F.2d 233 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

3. Elements of the crime

To prove the defendant guilty of a violation of 18 U.S.C. § 1503, the Government must prove that he knew or

had reason to know that a judicial proceeding was pending in a federal court,148/ and that the effect of his act would be to obstruct justice.149/ Furthermore, the Government must show that the defendant acted with specific intent, or "corruptly."150/

a. A pending proceeding

The Government must prove that a proceeding was pending in a federal court and that the defendant in the § 1503 action had reason to know of it before he acted to or endeavored to obstruct justice.151/ The proceeding may be civil152/ or criminal, including a grand jury investigation.153/ The

---

148/ Pettibone v. United States, 148 U.S. 197, 206 (1893).

149/ United States v. Solow, 138 F. Supp. 812, 816 (S.D.N.Y. 1956).

150/ A sample indictment is contained in Appendix VII-5.

151/ Pettibone v. United States, 148 U.S. 197 (1893); United States v. Johnson, 605 F.2d 729, 730 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); United States v. Baker, 494 F.2d 1262, 1265 (6th Cir. 1974).

152/ Wilder v. United States, 143 F. 433, 440 (4th Cir. 1906) (construing Rev. Stat. §§ 5399 and 5440, precursors of § 1503), cert. denied, 204 U.S. 674 (1907); Roberts v. United States, 239 F.2d 467, 476 (9th Cir. 1956).

153/ United States v. Campanale, 518 F.2d 352, 356 (9th Cir. 1975) (per curiam), cert. denied, 423 U.S. 1050 (1976). United States need not be a party to the proceeding as the justice being administered is that of the United States.154/

A civil proceeding is pending once a complaint has been filed with a United States Commissioner.155/ A grand jury proceeding is pending once a subpoena has been "issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury".156/ No testimony need have been taken by the grand jury.157/ In fact, the grand jury need not be aware that subpoenas have been issued.158/

A criminal action continues to be pending "in the district court until disposition is made of any direct appeal taken by the defendant assigning error that could result in a new trial."159/

154/ Pettibone v. United States, 148 U.S. 197 (1893); Wilder v. United States, 143 F. supra.

155/ United States v. Metcalf, 435 F.2d 754, 756 (9th Cir. 1970).

156/ United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975).

157/ Id.

158/ United States v. Simmons, 591 F.2d 206, 210 (3d Cir. 1979).

159/ United States v. Johnson, 605 F.2d 729, 731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).

b. An act, the effect of which

would be to obstruct justice

Any conduct "designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court" can constitute an act which violates 18 U.S.C. § 1503.160/ The acts held to constitute obstructive conduct have varied so widely that one court observed that the reach of § 1503 is only limited by the imagination of the criminally inclined.161/

c. The act was done "corruptly",

or with specific intent

The state of mind required to violate 18 U.S.C. § 1503, is that of specific intent.162/ The act forming the basis for the obstruction charge must have been knowingly and deliberately done for an improper or evil purpose.

160/ Haili v. United States, 260 F.2d 744, 746 (9th Cir. 1958).

161/ Falk v. United States, 370 F.2d 472, 476 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).

162/ United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

The use of the word "corruptly" in the statute has been widely held to connote specific intent.163/ The specific intent standard goes not only to the act itself but also to proving that the defendant knew that a federal judicial proceeding was pending and that he acted with the purpose of interfering with it.164/ Only one case, United States v. Neiswender, 590 F.2d 1269 (4th Cir.), cert. denied, 441 U.S. 963 (1979), deviates from the specific intent standard. In Neiswender the defendant offered to "guarantee" a jury acquittal in return for a bribe from defense counsel. During his trial for obstruction of justice, the defendant argued that he had only intended to defraud defense counsel, not to cause him to reduce his efforts on behalf of his client and thus obstruct justice. The court held:

> [a] defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired.165/

163/ United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

164/ See Pettibone v. United States, 148 U.S. 197, 207 (1893); United States v. Baker, 494 F.2d 1262, 1265 (6th Cir. 1974); United States v. White, 557 F.2d 233, 235-36 (10th Cir. 1977) (per curiam). But see United States v. Yermian, 468 U.S. 63 (1984), where the Supreme Court held that 18 U.S.C. § 1001 did not require actual knowledge that the matter was under federal agency jurisdiction.

165/ 590 F.2d at 1274.

Specific intent may be proved by circumstantial evidence.166/ It may not, however, be presumed as a matter of law.167/

4. Venue

Where the act forming the basis of the obstruction charge and the proceeding at which it is aimed are in the same district, there is no question as to where venue lies. When they are in different districts, however, the circuits are split on whether venue lies where the proceeding is pending or where the act occurred. The greater weight of authority is that venue lies where the proceeding is pending.168/ The D.C. Circuit, Seventh Circuit, and the Eastern District of Pennsylvania hold that venue is only proper where the act occurred.169/

C. False Statements 18 U.S.C. § 1001

166/ United States v. White, 557 F.2d at 235.

167/ United States v. Haldeman, 559 F.2d 31, 116 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

168/ United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981); United States v. Kibler, 667 F.2d 452 (4th Cir.), cert. denied, 456 U.S. 961 (1982); United States v. O'Donnell, 510 F.2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975); United States v. Barham, 666 F.2d 521 (11th Cir.), cert. denied, 456 U.S. 947, reh'g denied, 456 U.S. 1012 (1982). Kibler, Barham, Tedesco and O'Donnell all reserve decision on the question of whether venue only lies where the proceeding is pending.

169/ United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971); United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979) (§ 1510); United States v. Bachert, 449 F. Supp. 508 (E.D. Pa. 1978).

1. Text of 18 U.S.C. § 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined no more than $10,000 or imprisoned not more than five years or both.

18 U.S.C. § 1001, the general false statements statute, is aimed at "protect[ing] the authorized functions of governmental departments and agencies from the perversion which might result from . . . deceptive practices. . . ."170/ The statute overlaps with a myriad of other false statements statutes that are keyed to specific federal agencies or federally-assisted activities.171/ The courts have held that the making of a false statement may be prosecuted under § 1001 even if another, more specific false statement statute applies to the alleged conduct.172/ The fact that the more specific statute authorizes less severe penalties than § 1001 is of no consequence.173/

170/ United States v. Gilliland, 312 U.S. 86, 93 (1941) (construing predecessor statute to § 1001).

171/ E.g., 18 U.S.C. § 1012 (Department of Housing and Urban Development transactions); 18 U.S.C. § 1020 (Highway projects).

172/ E.g., United States v. Gilliland, 312 U.S. at 95; United States v. Anderez, 661 F.2d 404, 407-08 (5th Cir. Unit B Nov. 1981).

2. The nature of the offense

The forerunner of the present § 1001 proscribed the making of false pecuniary claims to the Federal Government, but not the furnishing of false information. In 1934, the statute was amended to substantially its present form.174/

Section 1001 applies to three types of conduct: (1) falsifying, concealing, or covering up a material fact by any trick, scheme, or device; (2) making false, fictitious or fraudulent statements or representations; and (3) making or using any false document or writing. It has been said that § 1001 "encompasses two distinct offenses, false representation and concealment of a material fact."175/

3. The elements of the offense

173/ Id.u

174/ For a discussion of the legislative history of the Act, see United States v. Yermian, 468 U.S. 63 (1984).

175/ United States v. Tobon-Builes, 706 F.2d 1092, 1096 (11th Cir. 1983). But see United States v. Uco Oil Co., 546 F.2d 833, 838 (9th Cir. 1976) (concluding that § 1001 does not create distinct offenses and that the Government cannot charge separate offenses under the "making a false statement" and "concealing" clauses of the statute based on the same false document), cert. denied, 430 U.S. 966 (1977).

The elements of a § 1001 violation are generally stated to be: (1) a statement (2) that is false, (3) material, (4) made knowingly and willfully, and (5) made in relation to a matter within the jurisdiction of a department or agency of the United States.176/

a. Statements

The courts agree that § 1001 covers both oral and written statements.177/ The statement need not be sworn.178/ Writing "N/A" in response to a question may be considered an "answer" and thus a statement within the meaning of § 1001.179/

A person who leaves the space provided on a form for an answer blank may be deemed to represent implicitly that he has no relevant information to supply. If the contrary is true, the failure to disclose may be punishable under the "concealing" clause of § 1001.180/ Note, however, that with

---

176/ See, e.g., United States v. Jackson, 714 F.2d 809, 812 (8th Cir. 1983).

177/ See United States v. Beacon Brass Co., 344 U.S. 43, 46 (1952).

178/ See United States v. Isaacs, 493 F.2d 1124, 1157 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

179/ United States v. Mattox, 689 F.2d 531, 532 (5th Cir. 1982).

180/ United States v. Muntain, 610 F.2d 964, 971-72 (D.C. Cir. 1979); United States v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982). But see United States v. London, 550 F.2d 206, 213 (5th Cir. 1977) (to sustain a charge under concealing clause, the Government must "demonstrat[e] not merely that the [defendants] failed to disclose the existence of [material facts], but rather that the defendants committed affirmative acts constituting a trick, scheme, or device by which they sought to conceal material facts.").

respect to a charge under the "concealing" clause of § 1001, the Government may be required to show that "the defendant had a duty to disclose the material facts at the time he was alleged to have concealed them."181/ It is not always easy to draw clear distinctions between the "making a false statement" and "concealing" clauses of § 1001 because falsifying one fact may serve to conceal another fact that should have been disclosed.182/

b. Falsity

The element of falsity is satisfied either by the making of a false statement or the concealing of a material fact. "A statement is 'false' or 'fictitious' if untrue when made and known to be untrue by the person making it or causing it to be made."183/

The rule is that "absent [a] fundamental ambiguity, the question of what a defendant meant when he made his representation will normally be for the jury."184/ If a statement objectively admits of more than one interpretation, the Government sustains its burden of proof only if it

---

181/ United States v. Irwin, 654 F.2d at 678-79.

182/ See United States v. Private Brands, Inc., 250 F.2d 554, 555-56 (2d Cir. 1957), cert. denied, 355 U.S. 957 (1958);

Coil v. United States, 343 F.2d 573, 576 (8th Cir.), cert. denied, 382 U.S. 821 (1965).

183/ United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979).

184/ United States v. Diogo, 320 F.2d 898, 907 (2d Cir. 1963).
"negative[s] any reasonable interpretation that would make the defendant's statement factually correct."185/

The courts have held that the making of false statements concerning future intentions is actionable under § 1001.186/

c. Materiality

Section 1001 does not contain an explicit materiality requirement for the offenses of making a false statement or using a false writing or document, but does contain such a requirement for the offense of falsifying, concealing, or covering up a material fact. Nevertheless, the great weight of authority holds that § 1001 should be read to require a showing of materiality regardless of which clause the defendant has been charged with violating.187/ The question of the materiality of a false statement under

---

185/ United States v. Anderson, 579 F.2d 455, 460 (8th Cir.), cert. denied, 439 U.S. 980 (1978).

186/ See, e.g., United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980); Russell v. United States, 222 F.2d 197, 198 (5th Cir. 1955).

187/ See, e.g., United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir.) (prosecution under "making a false statement" clause), cert. denied, 447 U.S. 907 (1980); United States v. Voorhees, 593 F.2d 346, 349 (8th Cir.) (prosecution under "making or using a false document" clause), cert. denied, 441 U.S. 936 (1979). Contra United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir.) ("materiality is not an element of the offense of making a false statement in violation of § 1001"), cert. denied, 469 U.S. 822 (1984).

§ 1001 is one of law.188/

The materiality requirement of § 1001 has been liberally construed. A statement is "material" within the meaning of the statute if it has "a natural tendency to influence, or [is] capable of affecting or influencing, a government function."189/ To establish materiality, it is not necessary to show that a federal agency relied upon the false statement,190/ that the false statement influenced a federal agency,191/ that a federal agency was misled by the false statement,192/ or that the Federal Government sustained a loss on account of the false statement.193/ A false statement may be material under § 1001 even if it is not required to be made by statute or regulation,194/ and even if it is not made directly to a federal

---

188/ E.g., United States v. Abadi, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); United States v. Clancy, 276 F.2d 617, 635 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961). Contra United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979).

189/ United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975); United States v. Steele, 896 F.2d 998, 1006 (6th Cir. 1990).

190/ United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. Unit A Sept. 1981), cert. denied, 455 U.S. 948 (1982); United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982).

191/ United States v. Cole, 469 F.2d 640, 641 (9th Cir. 1972) (per curiam); United States v. Fern, 696 F.2d 1269, 1274 (11th Cir. 1983).

192/ United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1976).

193/ See United States v. Gilliland, 312 U.S. 86, 93 (1941).

194/ See United States v. Diaz, 690 F.2d at 1358.

195/ See United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980).

agency.195/ These issues are usually discussed by the courts in connection with the federal agency jurisdiction element of § 1001. The courts have recognized that the materiality and jurisdictional elements of § 1001 "are logically related."196/

d. Intent

To violate § 1001, a false statement must be made knowingly and willfully. A statement is made "knowingly" if it is made with knowledge or awareness of the true facts, and is not prompted by mistake, accident, or other innocent reason.197/ The Government is not required to show that the defendant had actual knowledge of federal agency jurisdiction, or of the statutory provision proscribing the alleged conduct.198/

The Supreme Court in United States v. Yermian, 468 U.S. 63 (1984), noted that § 1001 "contains no language suggesting any. . . requirement that false statements be. . . [made] with the intent to deceive the federal government."199/ However, some pre-Yermian cases hold that § 1001 extends only to conduct undertaken with the intent to deceive.200/ The legislative

---

196/ United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980).

197/ See United States v. Baker, 626 F.2d 512, 516 (5th Cir. 1980).

198/ Johnson v. United States, 410 F.2d 38, 47 (8th Cir.), cert. denied, 396 U.S. 822 (1969).

199/ United States v. Yermian, 468 U.S. at 69.

200/ See, e.g., United States v. Markey, 693 F.2d 594, 596 (6th Cir. 1982).

history of § 1001 clearly supports the conclusion that the intent to defraud is not an element of the offense.201/

The knowledge requirement of § 1001 may be satisfied by proof that the defendant made a false statement with "reckless disregard of the truthfulness of the statement and with a conscious purpose to avoid learning the truthfulness of the statement."202/

An act is committed "willfully" under § 1001 if it is done "deliberately and with knowledge."203/ The willfulness element of § 1001 has been construed to require proof that the defendant had "the intent of 'bringing about' the forbidden

act."204/ The element of willfulness does not require a showing of evil intent.205/

e. Federal agency jurisdiction

201/ See United States v. Yermian, 468 U.S. at 70; United States v. Gilliland, 312 U.S. 86, 93-94 (1941).

202/ United States v. Evans, 559 F.2d 244, 246 (5th Cir. 1977), cert. denied, 434 U.S. 1015 (1978); cf. United States v. Sarantos, 455 F.2d 877, 880-82 (2d Cir. 1972).

203/ United States v. Carrier, 654 F.2d 559, 561 (9th Cir. 1981).

204/ United States v. Markee, 425 F.2d 1043, 1046 (9th Cir.), cert. denied, 400 U.S. 847 (1970).

205/ McBride v. United States, 225 F.2d 249, 253-55 (5th Cir. 1955), cert. denied, 350 U.S. 934 (1956).

1) Department or agency.206/ In United States v. Bramblett, 348 U.S. 503, 509 (1955), the Supreme Court stated that the term "department" as used in § 1001 "was meant to describe the executive, legislative, and judicial branches of the Government." Hence, a host of governmental units have been found to constitute "departments or agencies" within the meaning of § 1001.

Although the Supreme Court in Bramblett expressly included the judicial branch of the

Government in the definition of the term "department" for the purposes of § 1001, the lower courts have tended to construe the statute more narrowly in prosecutions based upon the making of false statements in judicial proceedings. The prevailing view is that § 1001 protects the '"administrative' or 'housekeeping' functions, not the 'judicial machinery' of the court[s]."207/ Thus, the courts have extended the reach of § 1001 to providing false identifying information to a

---

206/ 18 U.S.C. § 6. Department and agency defined

> As used in this title:
>
> The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows such term was intended to be used in a more limited sense.

207/ United States v. Morgan, 309 F.2d 234, 237-38 (D.C. Cir. 1962) (dicta), cert. denied, 373 U.S. 917 (1963); United States v. Holmes, 840 F.2d 246, 248 (4th Cir. 1988).

magistrate208/, filing false affidavits with the court clerk in connection with a bail related transaction209/ and filing fraudulent appearance bonds in a bankruptcy action.210/. However, courts have refused to extend § 1001 to the giving of false testimony before a grand jury,211/ the making of false representations to a United States Magistrate at a removal and bail

hearing,212/ the filing of an affidavit containing false statements in a private civil action in federal court,213/ the introduction of a false document at a federal criminal trial,214/ and the falsification of a judicial order in a federal civil action.215/

208/ United States v. Plascencia-Orozco, 768 F.2d 1074, 1076 (9th Cir. 1985).

209/ United States v. Burkley, 511 F.2d 47 (4th Cir. 1975).

210/ United States v. Rowland, 789 F.2d 1169 (5th Cir. 1986).

211/ United States v. Allen, 193 F. Supp. 954, 959 (S.D. Cal. 1961).

212/ United States v. Abrahams, 604 F.2d 386, 393 (5th Cir. 1979).

213/ United States v. D'Amato, 507 F.2d 26, 30 (2d Cir. 1974).

214/ United States v. Ehrhardt, 381 F.2d 173, 175 (6th Cir. 1967).

215/ United States v. London, 714 F.2d 1558, 1562 (11th Cir. 1983). But see United States v. Burkley, 511 F.2d 47, 50 (4th Cir. 1975) (§ 1001 covers submitting false affidavits to Clerk of the District Court to secure bail bonds); United States v. Powell, 708 F.2d 455, 457 (9th Cir.) (§ 1001 covers submitting a false affidavit to a United States Magistrate in applying for leave to proceed in forma pauperis), cert. denied, 467 U.S. 1254 (1983); United States v. Stephens, 315 F. Supp. 1008, 1010 (W.D. Okla. 1970) (§ 1001 covers making false statements in a federal civil proceeding to vacate a criminal sentence).

2) Jurisdiction. The issue of whether a false statement was made "in any matter within the

jurisdiction of any department or agency of the United States" is ordinarily treated as a question of fact.216/ Some circuits hold, however, that this question may properly be decided by the trial judge.217/

The Supreme Court has stated that the "term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001."218/ In United States v. Rodgers, 466 U.S. 475, 479 (1984), the Supreme Court defined the rule as follows:

> A department or agency has jurisdiction [under § 1001] when it has the power to exercise authority in a particular situation. . . .Understood in this way, the phrase "within the jurisdiction" merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.

216/ See, e.g., United States v. Montemayor, 712 F.2d 104, 106-07 (5th Cir. 1983).

217/ Terry v. United States, 131 F.2d 40, 44 (8th Cir. 1942); Pitts v. United States, 263 F.2d 353, 358 (9th Cir.), cert. denied, 360 U.S. 935 (1959); United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982); United States v. Goldstein, 695 F.2d 1228, 1236 (10th Cir. 1981), cert. denied, 462 U.S. 1132 (1983).

218/ Bryson v. United States, 396 U.S. 64, 70 (1969).

The defendant in Rodgers allegedly made false crime reports to the FBI and the Secret Service. The Court held these facts stated an offense under § 1001 because there was a "'statutory basis' for the authority of the FBI and the Secret Service over investigations sparked by [the defendant's] false reports."219/

Federal agency jurisdiction under § 1001 has been found to exist in a wide variety of circumstances. The statute reaches statements not required to be made by statute or regulation,220/ as well as statements not made directly to a federal agency.221/ False statements made to federal agencies possessing only police or investigatory powers are also covered.222/

It is settled that the making of a false statement may be prosecuted under § 1001 even when "the federal agency's role is limited to financial support of a program it does not directly administer."223/ When a false statement is made to a non-federal entity that administers or implements a program that is funded by a federal agency, jurisdiction has been found to exist under § 1001 on the theory that:

219/ 466 U.S. at 481; cf. Bryson v. United States, 396 U.S. at 70-71.

220/ See, e.g., Ogden v. United States, 303 F.2d 724, 743 n.70 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964).

221/ See, e.g., United States v. Uni Oil, Inc., 646 F.2d 946, 955 (5th Cir. May 1981), cert. denied, 455 U.S. 908 (1982); United States v. Balk, 706 F.2d 1056, 1059 (9th Cir. 1983).

222/ See generally United States v. Rodgers, 466 U.S. 475 (1984); United States v. International Business Machs. Corp., 415 F. Supp. 668, 672 (S.D.N.Y. 1976) (dicta) (false statements made to Antitrust Division attorneys covered by § 1001).

223/ United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983).

> The necessary link between deception of the non-federal agency and effect on the federal agency is provided by the federal agency's retention of "the ultimate authority to see that federal funds are properly spent."224/

Consistent with this approach, the courts have upheld a finding of federal agency jurisdiction when a false statement is made in connection with a federally-assisted program that is subject to auditing by a federal agency.225/

When a federal agency acts in an essentially regulatory as opposed to funding capacity, agency jurisdiction has been found to exist when a false statement is made in a document that bears a reasonable relationship to an authorized function of the agency.226/ In addition, § 1001 punishes the making of a false statement to a private party who submits the information

---

224/ United States v. Petullo, 709 F.2d at 1180 (quoting United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980)); United States v. Wolf, 645 F.2d 23, 25 (10th Cir. 1981); see United States v. Jones, 464 F.2d 1118, 1123 (8th Cir.

1972), cert. denied, 409 U.S. 1111 (1973); United States v. Munoz, 392 F. Supp. 183, 186 (E.D. Mich. 1974), aff'd, 529 F.2d 526 (6th Cir. 1975).

225/ See United States v. Candella, 487 F.2d 1223, 1226 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974); United States v. Beasley, 550 F.2d 261, 276 (5th Cir.), cert. denied, 434 U.S. 863 (1977); United States v. Hooper, 596 F.2d 219, 223 (7th Cir. 1979); United States v. Canel, 569 F. Supp. 926, 928-29 (D.V.I. 1982), aff'd, 708 F.2d 894, 898 (3d Cir.), cert. denied, 464 U.S. 852 (1983).

226/ See generally United States v. Montemayor, 712 F.2d at 106-07; United States v. Diaz, 690 F.2d at 1357.
to a federal agency for use in connection with an authorized function of that agency.227/

4. Venue

The general rule is that venue to prosecute a violation of § 1001 lies either in the district where the false statement is prepared, executed, mailed or physically delivered to a federal agency, or in the district where the false statement is filed for final agency action.228/ However, when a false document is filed under a statute that makes the filing of the document a condition precedent to the exercise of federal jurisdiction, venue is proper only in the district where the document was filed for final agency action.229/

5. Defenses

a. Exculpatory denial defense

227/ See generally United States v. Uni Oil, Inc., 646 F.2d at 954-55; United States v. Wolf, 645 F.2d at 25.

228/ See United States v. Deloach, 654 F.2d 763, 766-67 (D.C. Cir. 1980), cert. denied, 450 U.S. 933 (1981); United States v. Herberman, 583 F.2d 222, 225-27 (5th Cir. 1978); United States v. Candella, 487 F.2d 1223, 1228 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974); 18 U.S.C. § 3237(a).

229/ Travis v. United States, 364 U.S. 631, 635-36 (1961).

The courts disagree on the applicability of § 1001 to exculpatory "no" statements -- false denials of culpability unaccompanied by other false statements. Some courts have suggested that the exculpatory denial defense is necessary to preserve the protection afforded by the privilege against self-incrimination.230/ Although several courts recognize the exculpatory denial defense, at least to some extent, the proper way to exercise the privilege against self-incrimination is to remain silent, not to lie.231/

The Fifth Circuit was the first court of appeals to recognize the exculpatory denial defense.232/ The First, Sixth, Eighth and Ninth Circuits have also approved this defense to a limited extent.233/ The extent to which the exculpatory denial defense will be recognized outside these Circuits is unclear.234/ It is clear, however, that the courts will refuse

230/ See, e.g., United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974).

231/ See Bryson v. United States, 396 U.S. 64, 72 (1969); United States v. Knox, 396 U.S. 77, 80-83 (1969); United States v. Steele, 933 F.2d 1313 (6th Cir. 1991).

232/ See Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962) ("mere negative responses to questions. . . by an investigating agent during a question and answer conference not initiated by the [defendant]" do not violate § 1001); see also United States v. Hajecate, 683 F.2d 894, 901 (5th Cir. 1982) (question on an income tax return regarding existence of foreign bank accounts was "investigative" and, thus, false answer to the question was beyond the scope of § 1001), cert. denied, 461 U.S. 927 (1983).

233/ See United States v. Chevoor, 526 F.2d 178, 182-84 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976); United States v. Steele, 896 F.2d 998, 1001 (6th Cir. 1990); United States v. Taylor, 907 F.2d 801, 804 (8th Cir. 1990); United States v. Medina De Perez, 799 F.2d 540 (9th Cir. 1986).

234/ See United States v. Grotke, 702 F.2d 49, 53-54 (2d Cir. 1983); United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988); United States v. King, 613

Footnote Continued to recognize

the defense where a truthful statement by the defendant "would not have involved possible self-incrimination."235/

b. Multiplicity

An indictment charging separate violations of § 1001 for each false document submitted is not multiplicitous,236/

even if all the false documents are submitted at one time.237/

234/ Continued

F.2d 670, 674 (7th Cir. 1980); United States v. Fitzgibbon, 619 F.2d 874, 879-81 (10th Cir. 1980); United States v. Tabor, 788 F.2d 714, 718-19 (11th Cir. 1986).

235/ See, e.g., United States v. Morris, 741 F.2d 188 (8th Cir. 1984).

236/ United States v. Bennett, 702 F.2d 833, 835 (9th Cir. 1983).

237/ United States v. Uco Oil Co., 546 F.2d 833, 838-39 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); United States v. Bettenhausen, 499 F.2d 1223, 1234 (10th Cir. 1974).